

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PHYLLIS LUCAS)	
Claimant)	
VS.)	
)	Docket No. 186,279
KELLY ASSISTED LIVING)	
Respondent)	
AND)	
)	
CNA INSURANCE COMPANIES)	
Insurance Carrier)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

Claimant appeals from an Award entered by Administrative Law Judge John D. Clark on December 8, 1997. The Appeals Board heard oral argument June 12, 1998.

APPEARANCES

Russell B. Cranmer of Wichita, Kansas, appeared on behalf of claimant. Christopher J. McCurdy of Wichita, Kansas, appeared on behalf of respondent and its insurance carrier. The Kansas Workers Compensation Fund is represented by Norman I. Cooley but there was no appearance for the Fund at oral argument before the Board.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge limited claimant to her functional impairment and awarded a 1.5 percent general body disability based upon the impairment rating by Dr. Paul Lesko. But at oral argument before the Board, the parties agreed that Dr. Lesko had changed

his opinion during his deposition testimony. His revised opinion was that claimant had a 2.5 percent functional impairment from this accident.

The ALJ denied work disability on the grounds that the claimant failed to make any effort to find employment and refused to attempt accommodated work offered by respondent. On appeal, claimant contends the ALJ failed to consider all the evidence and argues that when all evidence is considered she is entitled to a permanent total disability or a substantial work disability. Nature and extent of disability is the only issue raised by claimant.

Although respondent's brief requests the Board affirm Judge Clark's Award, respondent denies claimant met with any permanent injury as a result of her accident and, in addition, raises an issue concerning claimant's average weekly wage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds the Award should be modified to a 2.5 percent permanent partial general body disability with an average weekly wage of \$250.36, but should otherwise be affirmed.

Findings of Fact

1. Claimant has worked as a CNA and Home Health Care Aide for many years. She injured her low back December 28, 1993 when lifting a client from a chair to a standing position.
2. Claimant received treatment first from Dr. Val Brown at the Minor Emergency Center and then at the direction of Dr. Jay Stanley Jones. The treatment included physical therapy. Surgery was discussed but never performed. Claimant has also been treated and/or examined by many other physicians including Drs. Michael P. Estivo, Paul S. Stein, Kelly A. Trygg, Jeanette C. Salone, Daniel D. Zimmerman, Paul D. Lesko, Terry Summerhouse and Bernard T. Poole.
3. Claimant never returned to work but continued to have problems. The ALJ appointed board certified orthopedic surgeon Dr. Paul Lesko to do an IME. Dr. Lesko diagnosed discogenic low back pain with quasi-radicular symptoms. He recommended an MRI or a CT myelogram before considering any surgical treatment but deferred to the opinion of Dr. Stein in this regard. As stated above, Dr. Lesko determined claimant had a 5 percent permanent impairment of function, with 50 percent preexisting for a net of 2.5 percent from the work-related accident. He recommended restrictions of maximum lifting 20 pounds and limit bending and twisting to 20 degrees. The Appeals Board agrees with the ALJ's conclusion that Dr. Lesko's opinions are the most credible and should be adopted by the fact finder as its own.
4. The evidence indicates claimant could not return to her regular work for respondent but respondent did offer accommodated work. Debbie Hammond testified that respondent's

offers of accommodated work would have paid the same hourly rate as the job claimant was performing when she was injured. Claimant refused to attempt that work and claimant was not working at the time of the regular hearing. The record does not indicate that claimant has made a good faith effort to obtain other employment since leaving work for respondent. In fact, claimant has not made any attempt to find other employment.

5. Dr. Daniel D. Zimmerman evaluated claimant at the request of claimant's counsel. He rated the impairment at 18 percent of the whole body but 7 percent of this impairment rating was attributed to the preexisting lumbar disk disease. Dr. Zimmerman gave no opinion on task or wage loss except to state that he did not feel claimant could return to CNA and home health aide jobs. He restricted her to less than the full range of light work activities as defined by the DOT. Specifically, his restrictions were to lift no more than 20 pounds on an occasional basis, 10 pounds on a frequent basis, avoid frequent flexing of the lumbosacral spine, thus avoiding bending, stooping, squatting, crawling and kneeling activities.

6. Vocational expert Karen Terrill concluded claimant retained the ability to earn more than 90 percent of her preinjury average weekly wage within either Dr. Lesko's or Dr. Zimmerman's restrictions. Although Dr. Salone had restricted claimant initially to four hours per day of work, this restriction was not intended as permanent. No other physician restricted claimant to work less than 40 hours per week.

7. The Appeals Board is also mindful of the claimant's testimony that she does not believe that she can perform work within Dr. Lesko's restrictions and of the opinion by Dr. Poole to the effect that given all of claimant's various health problems she is essentially unemployable, but determines not to accept those opinions as facts.

8. At the time of the accident, claimant earned \$6.25 per hour and was a full-time employee. Her base wage was, therefore, \$250 per week. She earned a total of \$9.38 in overtime for the 26 weeks before the accident for an average of \$.36 per week. Claimant earned no fringe benefits or additional compensation. Her gross average weekly wage was \$250.36.

Conclusions of Law

1. Claimant has the burden of proving her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).

2. K.S.A. 44-508(g) defines "burden of proof" and that statute specifically requires the fact finder to make its determination on the basis of the whole record. K.S.A. 44-501(a) likewise requires the finder of fact to consider the whole record.

3. Claimant may not refuse to accept a reasonable offer for accommodated work. If the claimant refuses to even attempt such work, the wage of the accommodated job is imputed to the claimant in the work disability calculation. Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140, rev. denied 257 Kan. 1091 (1995). A comparable wage will be imputed

to claimant based on what claimant would have earned had she attempted the respondent's offer of accommodated work. Because claimant was able to return to a job earning a wage which was 90 percent or more of her preinjury wage, claimant is not entitled to a work disability award. K.S.A. 44-510e.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated December 8, 1997 should be, and is hereby, modified to award a 2.5% permanent partial disability based upon an average weekly wage of \$250.36.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Phyllis Lucas, and against the respondent, Kelly Assisted Living, and its insurance carrier, CNA Insurance Companies, for an accidental injury which occurred December 28, 1993, and based upon an average weekly wage of \$250.36 for 38 weeks of temporary total disability compensation at the rate of \$166.92 per week or \$6,342.96, followed by 9.8 weeks at the rate of \$166.92 per week or \$1,635.82, for a 2.5% permanent partial general disability, making a total award of \$7,978.78, which is ordered paid in one lump sum less any amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of November 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Russell B. Cranmer, Wichita, KS
Christopher J. McCurdy, Wichita, KS
Norman I. Cooley, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director